STATE OF MICHIGAN

COURT OF APPEALS

LOWELL SLATER, JR., and DENISE SLATER, Plaintiffs-Appellees,	UNPUBLISHED September 20, 2007
v	No. 272097 Wayne Circuit Court
DANIEL SCHULTZ and TERRIE SCHULTZ, Defendants-Appellants.	LC No. 04-432954-CH

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

In this action to quiet title to a disputed boundary line, defendants appeal as of right from the trial court's order determining the location of the boundary line. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs and defendants own adjoining residential properties in Livonia. A gravel driveway and parking area run along the adjoining side. Plaintiffs alleged that they and their predecessors in title solely owned, claimed to own, used, and maintained the driveway and parking area for more than the statutory period of 15 years. Claiming that their interest in the property was established by adverse possession and abandonment, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(9) and (10). In support of their motion, they submitted the affidavit of plaintiff Lowell Slater, who averred that plaintiffs and their predecessors in interest solely claimed and used the disputed property in a manner that was open and adverse to the claims of any other for an uninterrupted period of 15 years or more. Plaintiffs also submitted photographs of their property and the disputed driveway, copies of deeds for their property dating back to April 30, 1986, and correspondence and other documents regarding a trespass lawsuit maintained by defendants' predecessor in title against one of plaintiffs' predecessors in title.

In response, defendants noted that Patricia and Elwood Cardinal, the parents of defendant Terrie Schultz, previously owned their property. Defendants maintained that the previous litigation, pursued in 1991 by the Cardinals against one of plaintiffs' predecessors, concerned the location of a garage and fence that were thought to encroach on defendants' property. Defendants submitted an affidavit from defendant Terrie Schultz, who averred that either she or her parents had resided on defendants' property since 1969 and that her family had continuously used the driveway in a manner consistent with the boundaries described in the deed. Defendants also submitted a photograph depicting the gravel driveway with a handwritten wavy line running

along the approximate center of the driveway and the words "Boundary Line" written below the photograph.

At the hearing on plaintiffs' motion, upon inquiry by the trial court, defense counsel explained that the line was drawn in a wavy manner because he did not know the exact location of the boundary line and could not stipulate to its location. According to plaintiffs' counsel, plaintiffs were claiming a boundary line situated one foot from defendants' garage, extending to the back of the lot, approximately 300 feet. The trial court stated that the parties appeared to agree on the location of the boundary line and entered an order setting the location of the common boundary line as represented by plaintiffs' counsel, terminated defendants' claim to any portion of the land west of that line, and ordered plaintiffs to have a licensed surveyor create a survey showing the boundary line set by the court to be recorded with the Register of Deeds.

This Court reviews a circuit court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Actions to quiet title are equitable and therefore also reviewed de novo; however, the circuit court's factual findings are not reversed on appeal unless they are clearly erroneous. *Gorte v Dep't of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993). The circuit court did not state the subrule on which it relied to grant summary disposition, but because the court considered evidence outside the pleadings, this Court reviews the trial court's order as having been based on MCR 2.116(C)(10). *Mitchell Corp v Dep't of Consumer & Industry Services*, 263 Mich App 270, 275; 687 NW2d 875 (2004). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Singerman v Muni Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). When deciding such a motion, the court must consider the pleadings, affidavits, and the documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

The circuit court erred in entering an order establishing the boundary line according to plaintiffs' claim, without considering the affidavits and documentary evidence submitted by the parties. Apparently relying on the photograph submitted by defendants, the trial court stated that the wavy line on the photograph represented defendants' estimate of the location of the boundary line and found that the parties were in agreement about the location of the boundary. However, defendants' attorney never expressed agreement concerning the boundary, but rather stated that the line depicted on the photograph was only what defendants believed to be the approximate location of the boundary and explained that the line was drawn in a wavy manner because he did not know the true boundary line and could not stipulate to its location.

Further, the affidavits and other documentary evidence submitted by the parties did not entitle plaintiffs to summary disposition of their claims based on adverse possession or abandonment. "'A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years.'" *Wengel v Wengel*, 270 Mich App 86, 92; 714 NW2d 371 (2006), quoting *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993). The person claiming ownership by adverse possession has the burden of proving that the statute of limitations has expired. *Wengel, supra* at 92. To establish abandonment, it must be shown that there was "an intent to relinquish the property" and "there must be external acts that put that intention into effect." *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 717-718; 583 NW2d 232 (1998).

Plaintiffs have owned their property only since September 30, 1999. Although they showed a chain of title dating back to April 30, 1986, they presented no evidence regarding the allegedly adverse use of the driveway other than the affidavit of plaintiff Lowell Slater. However, the affidavit does not disclose that Slater had personal knowledge of his predecessors' use of the land and, therefore, does not "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit[,]" as required by MCR 2.119(B)(1). Moreover, the facts alleged in Slater's affidavit were disputed by the affidavit of defendant Terrie Schultz, whose family has lived on defendants' property continuously since 1969. These competing affidavits establish the existence of a genuine issue of disputed fact regarding the use of the driveway by the parties and their predecessors, which is material to plaintiffs' claims of title through adverse possession or abandonment.

Accordingly, summary disposition was not appropriate and the trial court erred in entering its order establishing the boundary line.

Reversed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood